

*United States Court of Appeals
for the Second Circuit*



APPENDIX

74-1431

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 74-1431

UNITED STATES OF AMERICA ex rel.
ULYSSES BIRT,

Relator-Appellant,

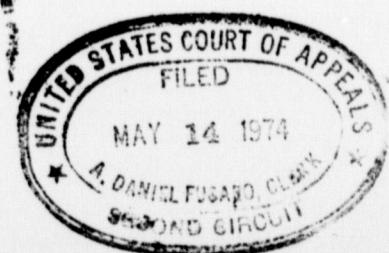
-against-

HON. THEODORE SCHUBIN, Superintendent,
Ossining Correctional Facility,
Ossining, New York, et al.,

Respondents-Appellees.

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF
NEW YORK

APPENDIX FOR RELATOR-APPELLANT



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New York, New York 10004

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U.S. CIVIL DOCKET
UNITED STATES DISTRICT COURT

Jury demand date:

4-8-82

Form No. 105 Rev.

TITLE OF CASE

S.E. EX REL. ULYSSES BIRT

VS

EDDIE SCHUBIN, SUPT OSSINING CORRECTIONAL FACILITY,
MING, N.Y.

For plaintiff:

ULYSSES BIRT
354 Hunter Street,
Ossining, N.Y. 10562

ATTORNEYS:

3113

For defendant:

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| STATISTICAL RECORD | COSTS | DATE | NAME OR RECEIPT NO. | REG. | DEPT. |
|----------------------------|--------------|------|------------------------|------|-------|
| 5 mailed X | Clerk | | | | |
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| of Action: REAS-CORPUS. | Docket fee | | | | |
| | Witness fees | | | | |
| on arose at: | Depositions | | | | |



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U.S.A. EX REL, ULYSSES BIRT, VS. THEODORE SCHUBIN SUPT. ETC,

PROCEEDINGS

DATE

Nov 14-72 Filed EMINITION FOR WRIT OF HABEAS CORPUS.

Nov 14-72 Filed Order permitting the pltff to proceed in forma pauperis without prepayment of fees. Curfein, J.

Nov 14-72 Filed pltffs Affidavit & Notice of Motion for the issuance of Writ of Habeas Corpus. Order directing the respondent to release petitioner forthwith, rtble on the 13th, day of Nov. 1972.

Dec. 8-72 Filed Affidavit in opposition.

Dec. 11-72 Filed Notice of Assignment to Judge Ward.

Dec. 11-72 Filed Traverse.

Mar. 15-73 Filed Supplemental Traverse.

Feb 23-74 Filed Memorandum Order. The Petition is dismissed. Ward J. (mailed notice)

Mar. 26-74 Filed Memo End. on motion dated 11/14/73. Petition dismissed in accordance with the memorandum decision filed herewith. Ward J. (mailed notice)

Mar. 26-74 Filed Supplemental Affidavit by Jerold Probst in opposition to petitioners application.

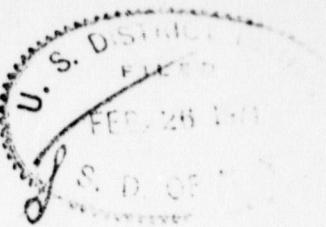
Mar. 28-74 Filed petitioners application for a certificate of probable cause.

Mar. 28-74 Filed memo end. on petitioner's application this date---Application for a certificate of probable cause is granted. So ordered, Ward, J. (pro se for notice)

Apr. 1-74 Filed Notice of Appeal. (Pro Se) (mailed notice)

A TRUE COPY
RAYMOND F. BURCHARDT, Clerk
By *John G. Burchardt*
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



UNITED STATES OF AMERICA ex rel.
ULYSSES BIRT,

Petitioner,

-against-

Pro Se 72 Civ. 4816
R.J.W.

HON. THEODORE SCHUBIN, Superintendent,
Ossining Correctional Facility,
Ossining, New York, et al.,

Respondents.

In this in forma pauperis petition for a writ of habeas corpus Ulysses Birt contests the legality of his 1971 conviction in New York Supreme Court for first degree robbery, grand larceny, and possession of a dangerous weapon. He alleges that his conviction was obtained in violation of the Constitution of the United States, in that he was not advised of his right to have counsel present at a pre-indictment line-up, and also in that the procedures used at that line-up were so impermissibly suggestive as to taint his subsequent in-court identification by a witness. For the reasons set forth below, the petition is dismissed.

Petitioner has exhausted his available state remedies by raising these issues in an appeal to the Appellate Division of the New York State Supreme Court, which unanimously affirmed his conviction, and in an application to the New York Court of Appeals, which denied him leave to appeal. He is not required to exhaust collateral state remedies, Brown v. Allen, 344 U.S. 443 (1953), nor to petition for certiorari to the United States Supreme Court. Fay v. Noia, 372 U.S. 391 (1963). Thus, he is properly before this Court.

Since petitioner's first claim, that he was not informed of his right to counsel at the pre-indictment line-up, is precluded under the doctrine of Kirby v. Illinois, 406 U.S. 682 (1972), it will not be considered further. His second claim merits greater attention, since the use of impermissibly suggestive identification procedures would void his conviction. Simmons v. United States, 390 U.S. 377 (1968); Neil v. Biggers, 409 U.S. 188 (1972).

The state court held a Wade hearing three months prior to trial, at which time, on the basis of the record before it, it determined that the identification procedures used did not preclude in-court identification of the accused. At that time it appeared that a robbery had occurred on

January 3, 1969, that the robber wore a ski mask, that a witness (Nichols) had seen a man leave a car resembling the getaway car and hitch a ride on a truck shortly thereafter, and that a ski mask and the stolen payroll were then found in this car. Various clues led the detective assigned to the case to petitioner's home later that afternoon; the detective removed several items from the premises. The next day petitioner was picked up and brought to the stationhouse to participate in a line-up. On that day Nichols was called to identify the man he saw leaving the getaway car. He went to the stationhouse and twice identified petitioner as that man. On the basis of this testimony, the trial judge held that an in-court identification was permissible.

At a Huntley suppression hearing immediately prior to trial, he ruled that the items removed from Birt's home on January 3, 1969, were admissible. These items included two photographs of petitioner. Later, at trial, after identifying petitioner as the man he saw leaving the car, Nichols testified that he had been shown those two pictures of petitioner prior to the line-up.

The trial judge thereupon reopened the Wade hearing. At the second hearing, the detective testified that he had never showed Nichols any pictures of petitioner. Nichols now

claimed that he had gone to the stationhouse the day of the robbery, been shown the pictures, been asked if this was the person he had seen, and had only the next day appeared at the stationhouse to identify petitioner in a line-up. This was the first time Nichols had mentioned a second visit to the stationhouse; to the contrary, he had several times testified that he first went to the stationhouse for the line-up, and that he first saw the detective at that time. The trial judge found as a fact that Nichols had been shown the pictures the day before the line-up, and that no impermissible suggestion had been used by the police officers in connection with the line-up itself. He declined to strike the evidence of the in-court identification of petitioner.

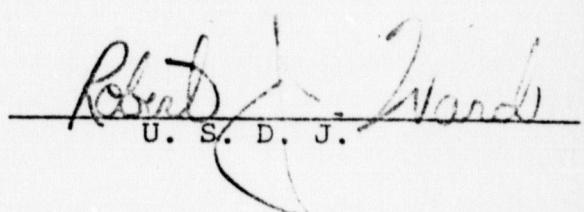
In a federal habeas corpus proceeding, the findings of fact of the state court are presumed to be correct, unless, upon an examination of the entire record, the federal court shall determine that those findings were not supported by the state court record. In such a case, the federal court is empowered, indeed obligated, to examine the circumstances afresh. 28 U.S.C. §2254(d); Townsend v. Sain, 372 U.S. 293 (1963). After careful examination of the state court record, this Court concludes that it supports the factual findings reached. The trial judge refused to believe the detective's

denial that he showed the witness any pictures. Instead, after observing Nichols, he believed the witness' final account, which although it differed materially from evidence introduced through him and others at earlier stages of the proceeding is supported by the state court record.

Accordingly, the petition is dismissed.

It is so ordered.

Dated: February 26, 1974



U. S. D. J.

United States District
FOR THE
Southern District of Ne

U.S.A. ex rel. ULYSS

Pe

-against

HON. THEODORE SCHUB

Re

MEMORANDUM

Robert J. Ward,

Pro Se 72
R.J.

FPI-88-2-28-73-

(A-8)

Court

New York

ES BIRT,

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espondents.

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D. J.

Civ. 4816

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IM-693

(A-8)

COPY OF THE WRITTEN PAPER
RECEIVED
DEPARTMENT OF LAW

MAY 14 1974

NEW YORK CITY OFFICE

ATTORNEY GENERAL